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In The

Supreme Court of the United States

October Term, 1978

No. 78-63

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent respectfully prays that a Writ of Certiorari to review the judgment of the Supreme Court of Virginia entered on April 11, 1978, which upheld petitioner's conviction for possession of marijuana with intent to distribute, not be granted.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia was an unreported memorandum opinion which is set out in full at page 5a of the Appendix to the Petition for a Writ of Certiorari.

STATEMENT OF FACTS

On July 30, 1976, Deputy R. D. Davis of the Westmoreland County Sheriff's Office was approached by a reliable informant and advised that petitioner possessed 2 pounds of marijuana and 100 hits of speed and amphetamines. (Tr. at 83, 85). Deputy Davis searched the Colonial Beach area for petitioner, but was unable to find him. (Tr. at 85). On July 31, 1976, Deputy Davis was approached by a second confidential informant and advised that petitioner had asked the second informant whether he knew of anyone who wanted to buy a few ounces of marijuana, because petitioner had plenty of marijuana to sell. (Tr. at 86, 87). Then, Deputy Davis searched the second informant and gave him money to purchase marijuana from petitioner. (Tr. at 87). Approximately 50 minutes later, Deputy Davis received from the second informant a bag of plant material that field tested as marijuana. (Tr. at 87). The second informant also told Deputy Davis that petitioner said he'd sold over 300 pounds of marijuana and 1,000 hits of speed that weekend and that he was supposed to receive a shipment of "Columbian" that week and would return to Colonial Beach with it the next weekend. (Tr. at 87). On August 7, 1976, about 10:30 p.m., Deputy Davis met with a third reliable informant who stated that he had just purchased a baggie of marijuana from petitioner and that he had observed a medium amount of marijuana under the front seat in petitioner's car. (Tr. at 89). The informant described petitioner's car and told Deputy Davis that the car was parked in front of the Colonial Beach Hotel (Tr. at 90). Deputy Davis went to the Colonial Beach Hotel to check for the car, but it was not there. (Tr. at 90). At 11:10 p.m. the same night, while cruising near the Reno Hotel, Deputy Davis was stopped by the second informant

and advised that petitioner was in front of the Reno Hotel. (Tr. at 90). Deputy Davis then checked in front of the Reno Hotel for petitioner, but he was not there. (Tr. at 90). At 11:25 p.m. Deputy Davis picked up the third informant, and while they were cruising Colonial Avenue the informant spotted petitioner's car turning into the Colonial Beach Hotel. (Tr. at 90). Deputy Davis let the informant out and immediately pulled his car up behind petitioner's car. (Tr. at 90). When Deputy Davis pulled behind the car, two persons alighted from the passenger's side and petitioner got out of the driver's side. (Tr. at 90). Deputy Davis searched the two passengers and let them go. (Tr. at 90, 91). He then searched the petitioner and the petitioner's car. (Tr. at 91). Underneath the driver's side front seat, Deputy Davis found a brown paper grocery bag that contained, among other things, 11 clear plastic baggies filled with marijuana. (Tr. at 120, 121). Under the passenger's side front seat, Deputy Davis also found a wooden and metal pipe with a residue of marijuana, and a plastic baggie of marijuana. (Tr. at 121).

Prior to petitioner's trial for possession with intent to distribute, petitioner moved to dismiss the case on the ground that §§ 18.2-248 and 54-524.84:4 of the Code of Virginia (1950), as amended, violated equal protection and due process of the law because they arbitrarily and irrationally classified marijuana as a Schedule I drug. At a hearing on this question, petitioner presented the testimony of an expert witness, Dr. Dorothy V. Whipple. (Tr. at 8, 19). On cross-examination, Dr. Whipple testified that while she did not feel that marijuana should be classified as a Schedule I drug, other people "with all sorts of credentials" had conducted studies which concluded that long term marijuana use had the following physiological effects: brain damage;

damage to cellular structure; reduction of the sperm count and testoserone levels; sinusitis; pharyngitis; bronchitis; emphysema; and chomosome breakage. (Tr. at 47-50). Dr. Whipple also testified that she would strongly urge that pregnant women not use marijuana. (Tr. at 54).

JURISDICTION

Petitioner asserts that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Do §§ 18.2-248 and 54-524.84:4 of the Code of Virginia (1950), as amended, violate equal protection and due process of the law because they classify marijuana as a Schedule I drug?

2. Was the warrantless search of petitioner's car unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the Petition for a Writ of Certiorari previously filed with this Court.

STATEMENT OF THE CASE

Petitioner was indicted by a grand jury of Westmoreland County, Virginia, for possession with intent to distribute marijuana. Petitioner was tried without a jury on April 12, 1977, in Westmoreland County Circuit Court, convicted and, on June 1, 1977, sentenced to ten years imprisonment, eight of which the Court suspended.

On June 3, 1977, petitioner noted an appeal of his conviction to the Supreme Court of Virginia. He assigned as error, among others, the issues raised in this petition. On April 11, 1978, the Supreme Court of Virginia affirmed petitioner's conviction without an opinion.

ARGUMENT

I.

Sections 18.2-248 and 54-524.84:4 Of The Code Of Virginia (1950), As Amended, Do Not Violate Equal Protection And Due Process Of The Law Because They Classify Marijuana As A Schedule I Drug.

Petitioner argues that recent research has indicated that marijuana is not a dangerous drug. Accordingly, petitioner claims that it is utterly irrational to classify marijuana with more harmful drugs like morphine, heroin and amphetamines. Petitioner asserts that three cases have held that it is irrational to classify marijuana with drugs like heroin, and that it would be appropriate for the Court to grant the Writ in this case to resolve the alleged conflict created by these rulings.

Petitioner's argument overlooks the fact, however, that there is an overwhelming weight of authority that it does not violate equal protection or due process of the law to classify marijuana in the same schedule as narcotics or other allegedly more harmful drugs. 50 A.L.R.3d 1164; *Rener* v. *Beto,* 447 F.2d 20 (5th Cir. 1971), *cert. den.,* 405 U.S. 1051 (1972); *English* v. *Virginia Probation and Parole Board,* 481 F.2d 188 (4th Cir. 1973); *United States* v. *Kiffer,* 477 F.2d 349 (2nd Cir. 1973), *cert. den.,* 414 U.S. 831 (1973); *United States* v. *Rodriquez-Camacho,* 468 F.2d 1220 (9th Cir. 1972), *cert. den.,* 410 U.S. 985 (1973); *State* v. *Rao,* 370 A.2d 1310, 171 Conn. 600 (1976); *State* v. *Strong,* 245 N.W.2d 277 (S.D. 1976). These cases recognize the well

established principle that where the legislative judgment is drawn in question, the court's inquiry must be restricted to the issue whether any state of facts, either known or which could reasonably be assumed, affords support for the legislative judgment. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 82 L.Ed. 1234, 58 S.Ct. 778 (1938). These decisions also recognize that a legislature is free to adopt any classification it deems appropriate to promote the general welfare so long as the classification bears a reasonable relation to a proper legislative purpose. *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961).

While a number of medical experts have concluded that marijuana use is not particularly harmful, there is still a substantial body of medical experts who believe that long term marijuana use can have severe physiological and psychological effects on an individual. *See Hearings on the Marijuana-Hashish Epidemic and Its Impact on United States Security Before the Subcommittee to Investigate the Administration of the Internal Security Laws of the Senate Committee on the Judiciary*, 93rd Congress, 2nd Session (1974). Indeed, petitioner's own medical expert, Dr. Dorothy V. Whipple, acknowledged that other medical experts have concluded that long term marijuana use has the following physiological effects: brain damage; damage to cellular structure; reduction of the sperm count and testosterone levels; sinusitis; pharyngitis, bronchitis; emphysema; and chromosome breakage. (Tr. at 47-50). Accordingly, the courts which have considered the question have with virtual unanimity held that because there is a substantial conflict in the medical community as to the real consequences of long term marijuana use, legislatures have not acted irrationally in classifying marijuana with narcotics and other physically harmful drugs. *See United States* v. *Kiffer, supra* at 353,

Rener v. *Beto, supra* at 22 & 23, and *State* v. *Strong, supra* at 280. Respondent contends, therefore, that it would be inappropriate for the Court to substitute its judgment for that of the Virginia General Assembly when there is still an unresolved conflict as to the effects of marijuana use.

Petitioner also argues that there is a split of authority as to whether it is irrational to classify marijuana as a Schedule I drug, and urges the Court to grant the Writ to resolve this issue. In support of his argument he cites *People* v. *McCabe*, 275 N.E.2d 407, 49 Ill.2d 338 (1971); *People* v. *Sinclair*, 194 N.W.2d 878, 387 Mich. 91 (1972); and *State* v. *Kantner*, 493 P.2d 306 (Haw. 1972), *cert. den.*, 409 U.S. 948 (1972).

In *People* v. *McCabe* the Supreme Court of Illinois held that it violated equal protection to classify marijuana under the Narcotic Drug Act, with drugs such as heroin and morphine, rather than under the Drug Abuse Control Act, which included barbituates, amphetamines and hallucinogens. *People* v. *McCabe* is certainly distinguishable from the situation presented by Virginia's statutes, because § 54-524.84:4 includes not only marijuana, heroin and morphine in Schedule I, but also amphetamines, barbituates and hallucinogens. Chief Justice Underwood's dissent in *McCabe* noted that the defendant in that case conceded that it might not be irrational to classify marijuana with "hard drugs" if there was only one classification. *People* v. *McCabe, supra* at 415. Rather, defendant's complaint, and the Court's holding, was that it was irrational to classify marijuana with heroin and morphine instead of with hallucinogens, which it more closely resembled. *People* v. *McCabe, supra* at 415. In reality, therefore, *McCabe* is not authority for the proposition that it is irrational to classify marijuana in a schedule with hallucinogens, as well as with heroin and morphine.

People v. *Sinclair, supra,* contained many opinions which for various reasons struck down Michigan's statute penalizing the "possession" of marijuana. Even the opinions which held that the statute's classification of marijuana violated equal protection, however, held that the statutory classification violated equal protection because it classified marijuana with hard drugs such as opiates, rather than with other hallucinogens. *People* v. *Sinclair, supra* at 894. Moreover, the Court's decision in *Sinclair* was influenced by the fact that they were concerned with a case of mere "possession" and not a case which had elements of distribution such as a charge for possession with intent to distribute. *People* v. *Sinclair, supra* at 896. Accordingly, respondent contends that there is no conflict between *People* v. *Sinclair* and the Virginia statutes cited by petitioner.

In *State* v. *Kantner, supra,* the Supreme Court of Hawaii held that in a "possession" case it did not violate equal protection to classify marijuana with narcotics where substantially lower penalties were provided for possession of marijuana than were provided for possession of narcotics. Petitioner argues from this that since Virginia's statutes do not provide lower penalties for possession of marijuana with intent to distribute than they do for possession of drugs like heroin and amphetamines with intent to distribute, they are irrational. Petitioner's argument ignores the fact, however, that Hawaii provided identical penalties for distribution of marijuana and for distribution of narcotics. *State* v. *Kantner, supra* at 309. Indeed, the Supreme Court of Hawaii stated that while the distribution offenses were not before them, they doubted that it was irrational for the legislature to have treated distribution of marijuana and distribution of narcotics the same. *State* v. *Kantner, supra* at 309. Respondent submits, therefore, that *Kantner* is not in conflict with the Virginia statutes cited by petitioner.

Finally, respondent would point out that petitioner was charged with possession of marijuana with intent to distribute, and not mere possession of marijuana. Respondent submits that the fact that this was a distribution related offense is an added element which justified the Virginia General Assembly's classification of marijuana with drugs such as heroin and morphine, as well as with other hallucinogens. *See United States* v. *Kiffer, supra* at 353. Furthermore, respondent would also note that while the maximum penalty for possession with intent to distribute was 40 years imprisonment, petitioner was in fact only sentenced to 2 years actual imprisonment. Accordingly, respondent alleges that petitioner was treated very fairly by the courts below, and that review is not necessary to correct a hardship imposed.

ARGUMENT

II.

The Warrantless Search Of Petitioner's Car Was Not Unreasonable.

Petitioner argues that the search of his car was unreasonable under *United States* v. *Chadwick,* 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977). His argument is that whether or not it was proper for Deputy Davis to search his car, under *Chadwick,* Deputy Davis should have obtained a warrant to search the paper bag in which the marijuana was found.

Respondent contends, however, that *Chadwick* is not controlling on the question of whether Deputy Davis' search was reasonable. In *Chadwick* the relationship between the footlocker and the automobile was merely coincidental. The government did not try to justify the search under the automobile exception, but, rather, tried to extend the automobile

exception to other objects, such as footlockers, which were potentially mobile. *United States* v. *Finnegan,* 568 F.2d 637 (9th Cir. 1977); *United States* v. *Young,* 567 F.2d 799 (8th Cir. 1977), *cert. den.,* 434 U.S. 1079 (1978). The Court rejected the government's argument and held that the automobile exception should not be extended to objects such as footlockers, because a person does not have the lessened expectation of privacy in a locked footlocker that he has in an automobile. *United States* v. *Chadwick, supra* at 12. The Court also held that there were no exigent circumstances requiring a search of the footlocker because the locker had been safely transferred to the Boston Federal Building. *United States* v. *Chadwick, supra* at 13.

Respondent contends that circumstances were dramatically different in petitioner's case than they were in *Chadwick*. In petitioner's case the relationship of the paper bag and the auto was not merely coincidental. Deputy Davis had received information that marijuana was concealed and being transported in petitioner's car.

Further, there were exigent circumstances in petitioner's case. Deputy Davis had been searching for petitioner on and off for at least a week and had been unable to locate him. If the deputy had not stopped petitioner at the time that he did, and had gone to get a warrant instead, there was a very real possibility that he might have lost petitioner again and that the marijuana would have been disposed of before it could be seized. Moreover, while there is an expectation of privacy in a locked footlocker, there is nothing like that in a paper grocery bag.

Accordingly, respondent asserts that the principles controlling this case are found in decisions of this Court other than *Chadwick*. A long line of cases culminating in *Chambers* v. *Maroney,* 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975

(1970), *reh. den.* 400 U.S. 856, 27 L.Ed.2d 94, 91 S.Ct. 23 (1970), indicate that a search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway. Significantly, the Court there specifically rejected the argument implicitly made by petitioner; that there were no exigent circumstances because the car could have been seized and immobilized until a search warrant was obtained. While recognizing that it might be argued that seizure and immobilization was a lesser intrusion than an immediate search, the Court ruled that for constitutional purposes, there is no difference between seizing and holding a car before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. *Id.* at 51, 52. Given probable cause to search, either course is reasonable under the Fourth Amendment. *Id.* at 52.

Accordingly, respondent asserts that because of the exigent circumstances in the present case, the search of the contents of the automobile, including the paper bag, was reasonable.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Deputy Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and I have mailed three copies of this Brief for Respondent in Opposition to Grant of Certiorari to Leonard S. Rubenstein, 108 North Columbus Street, Post Office Box 1226, Alexandria, Virginia 22313 on or before October 11, 1978.

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